Filed 2/23/10 P. v. Gonzalez CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JUAN MOYA GONZALEZ, JR., Defendant and Appellant.	E047589 (Super.Ct.No. INF058178) OPINION

APPEAL from the Superior Court of Riverside County. John G. Evans, Judge. Affirmed.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Juan Moya Gonzalez, Jr., waived his right to a jury and was convicted in a bench trial of having sexual intercourse with a child under the age of

10 years (Pen. Code, § 288.7, subd. (a))[1] (count 1) and committing a lewd and lascivious act upon a child under the age of 14 by duress (§ 288, subd. (b)(1)) (count 3). He now challenges his conviction for a lewd and lascivious act upon a child under the age of 14 (§ 288, subd. (b)(1)) on the ground there is insufficient evidence to establish the act was committed by means of duress.

FACTUAL AND PROCEDURAL BACKGROUND

The victim in this case was defendant's six-year-old daughter. Defendant lived with his parents, i.e., the victim's paternal grandparents. The victim's mother testified she dropped her daughter off at the home of her paternal grandparents on April 14, 2007, so they could visit for the weekend. On Sunday, April 15, 2007, the victim's mother called to check on her daughter. Defendant told her the grandparents were not home and the victim was sleeping. She called back later and was able to talk to her daughter who spoke to her in a "fearful manner" and wanted to be picked up right away. When the mother arrived, the victim ran to the car. She would not look at or say goodbye to her father. The victim was "real quiet" during the ride home and "wouldn't talk."

At home, the mother asked the victim why she was so quiet. The victim ran to her room. The mother followed her and asked once again what was going on. The victim replied, "Mommy, I can't tell you." "My poppy told me not to tell you." After reassurance from the Mother, the victim revealed that her father had "stripped her nude"

[1] All further statutory references are to the Penal Code unless otherwise indicated.

and "placed his privates" inside her private parts. The mother took the victim to the police station.

A police investigator specially trained to conduct forensic interviews in child abuse and molestation cases testified he met with the victim on April 15, 2007. The victim said her father put his penis inside her vagina and anus, and it felt "[l]ike a snake was eating me." She also told the investigator her father "had done the same thing" before, but this time was different because "he had kissed her like a big girl, in the mouth."

The victim was also examined by a medical doctor specially trained to conduct forensic medical examinations of children in sexual assault cases. The examiner testified her findings were consistent with the possibility of sexual abuse. Abnormal findings for a child this age included a discharge and the presence of a hair located in the victim's vaginal area that did not belong to her. The examiner also noted there was "diffuse redness" in the vaginal area, which could have been caused by trauma, irritation, or infection. In the rectal area, there was a "small abrasion with a minute skin tear," which is "a sign of some sort of trauma." In addition, a laboratory analysis revealed the presence of seminal fluid inside the victim's underwear. Samples taken from the victim's underwear were also subjected to DNA analysis, and there was a statistically valid match between defendant's reference sample and the sample taken from the victim's underwear.

In an interview with a police detective after his arrest, defendant disclosed that the incident began when he set up a "happy house" inside his bedroom and was wrestling with the victim. He admitted he kissed the victim with an open mouth, touched her

buttocks with his penis, and rubbed his penis between her legs while she was lying on her stomach.

Defendant was charged by information with three counts: count 1, having vaginal sexual intercourse with a child under the age of 10 years (§ 288.7, subd. (a)); count 2, having anal sexual intercourse with a child under the age of 10 years (§ 288.7, subd. (a)); and count 3, committing a lewd and lascivious act upon a child under the age of 14 by duress (§ 288, subd. (b)(1)). It was further alleged defendant served two prior prison terms within the meaning of section 667.5, subdivision (b). On November 10, 2008, defendant waived his right to a jury trial. At the conclusion of a bench trial, the court convicted defendant of counts 1 and 3 and returned a not guilty verdict as to count 2. The trial court also found the prior conviction allegations to be true. However, the court concluded defendant served a concurrent term for these two prior convictions, so he only qualified for a one-year enhancement under section 667.5, subdivision (b).

On January 23, 2009, the trial court sentenced defendant on count 1 to an indeterminate term of 25 years to life with the possibility of parole. On count 3, the trial court imposed the middle term of six years, plus one year for the section 667.5, subdivision (b), enhancement, to be served consecutively to the indeterminate term.

DISCUSSION

Defendant contends the record lacks substantial evidence that he committed a lewd act on the victim under circumstances constituting "duress" within the meaning of section 288, subdivision (b)(1). According to defendant, "duress" is not evident because there is nothing to show there was a direct or implied threat of force, violence, danger,

hardship or retribution. Although the victim testified defendant told her not to tell, there was no evidence he threatened her with physical harm or with any other consequences if she did tell anyone. The victim also testified she was afraid of defendant, but she said she did not know why.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

A violation of section 288, subdivision (b)(1), is committed when any willful, lewd act upon a child under the age of 14 years is accomplished "by use of force, violence, duress, menace, or fear . . . ." In closing arguments, the prosecutor argued "duress" was involved in this case based on "all of the circumstances." These circumstances included the child's age, the defendant's size and strength as compared with the victim's, the relationship between defendant and the victim, and the conditions present at the time of the offense.

A totality of the circumstances approach is used to determine the existence of duress. (*People v. Veale* (2008) 160 Cal.App.4th 40, 46.) The long-standing and accepted definition of the term "duress" in section 288, subsection (b), is a follows: "[A] direct or implied threat of force, violence, danger, *hardship* or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted." (*People v. Leal* (2004) 33 Cal.4th 999, 1004.)

"Physical control can create 'duress' without constituting 'force.' 'Duress' would be redundant . . . if its meaning were no different than 'force,' 'violence,' 'menace,' or 'fear of immediate and unlawful bodily injury.' [Citation.] . . . Duress can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes. [Citations.] 'Where the defendant is a family member and the victim is young . . . the position of dominance and authority of the defendant . . .' is relevant to the existence of duress. [Citation.]" (*People v. Schulz* (1992) 2 Cal.App.4th 999, 1005.)

Viewing the totality of the evidence in the light most favorable to the judgment, we conclude the trier of fact could reasonably infer the sexual acts defendant committed against the victim were carried out under circumstances constituting duress. Our review of the record revealed more than enough circumstantial evidence to show defendant had absolute physical and parental control over the victim and she felt threatened by defendant. The evidence vividly discloses a very small, vulnerable child isolated from anyone who could protect her. The victim was defendant's daughter, and she was only

six years old. She testified he was bigger, stronger, and the trier of fact, of course, had an opportunity to view the relative sizes. More importantly, in a telling revelation, defendant told an investigator the victim at some point got "extremely upset," started crying, and ran out of the room. She tried to get out of the house by running to the front and back doors but remained inside the home, presumably because she was under defendant's physical and/or psychological control. The victim's behavior is, of course, highly indicative of someone who feels threatened or under duress.

It is true the victim was unable to articulate a specific threat. However, it would not be unreasonable for the trier of fact to infer the victim was only unable to do so due to her young age and because it was too painful for her to talk about. At trial, the victim had a difficult time talking about what happened to her, because she did not like "remembering." However, she did testify she was scared even though she said she did not know why. She also said she did not like what defendant was doing and wanted him to stop. In addition, she told an investigator and the trier of fact that defendant had done something similar to her when she was only five, so it could be inferred she was scared and felt threatened on this occasion because she knew she was in danger based on one or more prior experiences with defendant. In other words, the evidence supports a finding the threat to this little girl was implicit.

The record also includes other evidence supporting a finding the victim was under duress because she felt threatened. For example, the victim testified defendant told her not to tell her mother. The mother also testified the victim was reluctant to tell her what happened because defendant told her not to tell her mother. As defendant contends, it is

true the victim did not testify defendant threatened her with specific consequences if she told her mother. However, even a child this young would be able to perceive a father's directive not to tell the mother as a threat of retribution to be feared. In addition, the victim's mother testified her daughter "spoke in a fearful manner" when she called to check on her and wanted to be picked up "[r]ight away." When the victim came outside to meet her mother, "she ran into the car," would not say goodbye to defendant, and would not even look at him. According to the mother, this "was something strange." In addition, while the victim was testifying, defendant interrupted the proceedings by blurting out, "I love you," which the trier of fact could have viewed as a continued and telling attempt by defendant to coerce the victim.

In sum, the totality of evidence supports the trial court's implied finding defendant committed a lewd and lascivious act on his six-year-old daughter under circumstances constituting "duress" within the meaning of section 288, subdivision (b)(1). Based on the totality of evidence, the trier of fact could infer "duress" based on defendant's physical control over the victim under coercive circumstances and from evidence strongly indicating the victim felt threatened by defendant. We therefore conclude there is sufficient evidence to support defendant's conviction under section 288, subdivision (b)(1).

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

RICHLI
J.